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File: WAC 05 203 50319 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as a market research analyst as an L-1B nonimmigrant intracompany transferee having specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California and is allegedly a software development and consulting business.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a position involving specialized knowledge or that he has specialized knowledge; or (2) that the beneficiary had been employed abroad in a position involving specialized knowledge.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner submitted a letter dated December 13, 2005 and copies of previously submitted evidence.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a specialized knowledge capacity and whether the beneficiary has specialized knowledge as defined in the Act and the regulations. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner described the beneficiary's purported specialized knowledge, job duties abroad, and prospective job duties in the United States in a letter dated June 30, 2005 appended to the initial petition. As this letter is in the record, these descriptions will not be repeated here in their entirety. Generally, the beneficiary is described as having "proprietary specialized technical knowledge" of the petitioning organization's "process [and] procedures used in the international marketplace to assist clients with new and remediation plans for various software computer systems and business development." The beneficiary's duties both abroad and in the United States are generally described as marketing the petitioning organization's services.

On August 2, 2005, the director requested additional evidence. The director requested that the petitioner distinguish the beneficiary's duties abroad and in the United States, and the beneficiary's training, from those of other similarly employed workers. The director also asked the petitioner to describe the impact on its business should the petition not be approved.

In response, the petitioner submitted a letter dated September 7, 2005 in which it further describes the beneficiary's purported specialized knowledge, training, current job duties, and prospective job duties in the United States. Once again, as this letter is in the record, its contents will not be repeated here in their entirety. Generally, the petitioner has again described the beneficiary's duties abroad and in the United States as marketing the petitioning organization's software services.

The petitioner also described the beneficiary's training and purported specialized knowledge as follows:

Every employee working with [the foreign employer] is given training in the process and methodology adopted by [the petitioning organization] in implementing its projects to ensure that it is able to maintain the maturity and optimal level of its service to its customers.

[The beneficiary] has continued to work with [the foreign employer] without interruption since December 01, 2003 and he has been working as a Market Research Analyst. Based upon his work experience and his attendance at in-house training course, his Master [sic] Degree in computer science and Honors Diploma in Systems management, his Bachelor's of [S]cience degree and over seven years of experience in IT (information and technology marketing and sales) field, he has acquired proprietary specialized technical knowledge of the company process [and] procedures used in the international marketplace to assist clients with new and remediation plans for various software computer systems and business development.

The petitioner submitted training records indicating that the beneficiary attended nine different one-day, in-house training courses with between 7 and 19 other employees. These courses had titles such as "Overview of Technical Writing," "Basics of Software Testing," and "Java Refreshment." The petitioner submitted no other evidence of specific training courses attended by the beneficiary since he began working for the foreign employer approximately 19 months prior to the filing of the instant petition.

Finally, the petitioner explained in the September 7, 2005 letter that:

The minimum amount of time required to train an employee to fill the proposed position would be at least 5-6 months and at this stage [the petitioning organization] cannot venture to train a new person for this proposed position. Hiring a new person would mean to train him about the client needs and company process and methodologies. Further it would be a challenging task to have the clients[] faith in a new person and would mean to understand the client requirements from the scratch.

On November 14, 2005, the director denied the petition. The director concluded that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a position involving specialized knowledge or that he has specialized knowledge; or (2) that the beneficiary had been employed abroad in a position involving specialized knowledge.

On appeal, the petitioner submitted a letter dated December 13, 2005 asserting that the beneficiary has been and will be employed in a specialized knowledge capacity. In support, the petitioner resubmitted copies of previously submitted evidence.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary has been or will be employed in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

As a threshold matter, the petitioner's reliance on guidance on the interpretation of "specialized knowledge" provided in a 1988 Immigration and Naturalization Service memorandum is misplaced. Memo., Norton, Assoc. Commr., Examinations, Immigration and Naturalization Service (Oct. 27, 1988). First, as internal memoranda do not create any substantive rights in petitioners, the director's failure to follow such guidance would not be grounds for a withdrawal of the decision. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that Citizenship and Immigration Services (CIS) memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal

personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing an INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"); *Ponce-Gonzalez v. INS*, 775 F.2d 1342, 1346-47 (5th Cir. 1985) (finding that OIs are "only internal guidelines" for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien's eligibility for statutory relief from deportation was at worst "inaction not misconduct").

Second, in citing the 1988 memorandum, the petitioner entirely ignores more recent guidance on the interpretation of "specialized knowledge." For example, a 1994 memorandum regarding the interpretation of specialized knowledge is generally consistent with the director's decision in this matter. That memorandum states in part:

The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others.

Memo., Puleo, Acting Exec. Assoc. Commr., Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P, Pg. 4 (Mar. 9, 1994). While this memorandum does make clear that the knowledge does not need to be unique or proprietary, it must be different or uncommon. *Id.*

In view of the above, in examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8.C.F.R. § 214.2(l)(3). The petitioner must submit a detailed job description of the services that were and will be performed sufficient to establish that he has specialized knowledge. In this case, the petitioner failed to establish that the beneficiary has been or will be employed in a specialized knowledge capacity.

Although the petitioner repeatedly asserts that the beneficiary's position abroad and in the United States requires "specialized knowledge" and that the beneficiary had been and will be employed abroad in a "specialized knowledge" capacity, the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced software professionals employed by the foreign entity or in the industry at large. The petitioner describes the beneficiary as having "proprietary" specialized knowledge of the petitioning organization's "process [and] procedures used in the international marketplace to assist clients with new and remediation plans for various software computer systems and business development." However, as correctly noted by the director, the petitioner never specifically identifies the

proprietary processes and procedures of which the beneficiary supposedly has specialized knowledge.¹ Going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

The petitioner also asserts that the beneficiary gained this vaguely described specialized knowledge through a combination of in-house training and work experience. However, the only evidence of the beneficiary having received in-house training was his attendance at nine different one-day, in-house training courses. These courses appear to concern general subjects and, as explained by the petitioner, all employees of the foreign employer are trained in its processes and procedures. Therefore, the record is not persuasive in establishing that these training courses imparted knowledge that is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by the foreign employer's other employees or by other practitioners in the beneficiary's field of endeavor. Moreover, the petitioner offers no evidence supporting its claim that the beneficiary gained specialized knowledge of the organization's processes and procedures through "work experience." Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, the petitioner's assertion that preparing a similarly experienced and educated software professional to provide services in the United States instead of the beneficiary would be economically inconvenient is not persuasive. As explained above, the beneficiary was employed by the foreign entity for approximately 19 months prior to the filing of the instant petition. During that time, it appears that the beneficiary attended nine different one-day, in-house general training courses. While the petitioner asserts that it would take five to six months to "train" a replacement, it is unclear exactly what training sessions this replacement employee would need to attend given that, according to the petitioner, all of its employees already attend these training sessions. As indicated above, the record is devoid of evidence that the beneficiary attended any specialized training concerning the petitioning organization's customers, which could distinguish him from similarly employed workers. Although it is possible that the beneficiary has developed a rapport with certain customers which may be difficult to immediately replicate with a replacement employee, a relationship with one or more customers is not a proper basis for asserting that a beneficiary has "specialized knowledge" under the Act and regulations.

¹Although the fact that a beneficiary has experience with a proprietary product or procedure does not serve as *prima facie* evidence that the beneficiary possesses specialized knowledge, when such a claim is made, CIS must carefully evaluate the claimed knowledge and the depth of the beneficiary's experience in order to determine whether it rises to the level of specialized knowledge as contemplated by 8 C.F.R. § 214.2(l)(1)(ii)(D). Thus, while a beneficiary is no longer required to possess knowledge of proprietary products or processes in order to be deemed to have specialized knowledge, such knowledge can still be a basis for this determination.

Finally, even assuming that the beneficiary's knowledge of the petitioning organization's processes and procedures was sufficiently "specialized," the petitioner has not established that the beneficiary was employed in a specialized knowledge capacity for one continuous year preceding the filing of the instant petition. As indicated above, the beneficiary began working for the foreign employer approximately 19 months prior to the filing of the petition. Therefore, the beneficiary would have needed to have acquired the specialized knowledge in question shortly after the end of his seventh month of employment in order to be eligible for this visa classification, i.e., on or before July 14, 2004. However, the record is devoid of evidence that the beneficiary acquired his purported specialized knowledge on or before that date. To the contrary, given that the beneficiary attended all of the in-house training sessions after July 14, 2004 and given the importance that the petitioner has placed on those training sessions, it is more likely that not, assuming he even has specialized knowledge, that this knowledge was not acquired in time for him to have been employed abroad for at least one year in a specialized knowledge capacity.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioning organization. However, it is appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981)(citing *Matter of Raulin*, 13 I&N Dec. 618(R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation.

Id. at 53.

It should be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. 9, 15 (D.D.C. 1990). The Congressional record specifically states that the L-1 category was intended for "key personnel." See generally, H.R. REP. NO. 91-851, 1970 U.S.C.C.A.N. 2750. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." Webster's II New College Dictionary 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, the AAO

must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between the employee and the remainder of the petitioner's workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and productive employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). The decision noted that the 1970 House Report, H.R. REP. NO. 91-851, stated that the number of admissions under the L-1 classification "will not be large" and that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service." *Id.* at 51. The decision further noted that the House Report was silent on the subject of specialized knowledge, but that during the course of the subcommittee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner*, 18 I&N at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, "[m]ost employees today are specialists and have been trained and given specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees." 18 I&N Dec. at 119. According to *Matter of Penner*, "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended. 18 I&N Dec. at 53; *see also 1756, Inc. v. Attorney General*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to "key personnel" and "executives.")

As referenced above, the 1994 Immigration and Naturalization Service (now CIS) memorandum written by the then Acting Associate Commissioner also directs CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from James A. Puleo, Acting Exec. Assoc. Commr., Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P, Pg. 3 (Mar. 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is truly specialized." *Id.* The analysis for

specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

As explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the foreign entity or by software professionals employed elsewhere. As the petitioner has failed to document any materially unique qualities to the beneficiary's knowledge, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "key" employee. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced professional or that he has received special training in the company's methodologies or processes which would separate him from other professionals employed with the foreign entity or elsewhere. It is simply not reasonable to classify this employee as a key employee of crucial importance to the organization.

The legislative history of the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded that the beneficiary was not employed abroad and will not be employed in the United States in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.